

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 22, 2000

STATE OF TENNESSEE v. BRUCE MONROE STEVENSON

Direct Appeal from the Criminal Court for Bradley County
No. M-99-410 Carroll L. Ross, Judge

No. E2000-00805-CCA-R3-CD
January 12, 2001

The defendant, Bruce Stevenson, pled guilty to rape, robbery, aggravated assault and evading arrest. The trial court imposed sentences of ten years for the rape conviction, five years each for the robbery and aggravated assault convictions and two years for the evading arrest conviction. Because the sentence for rape was ordered to be served consecutively, the effective sentence was 15 years. In this appeal of right, the defendant challenges the application of the following enhancement factors: (1) The defendant has a previous history of criminal convictions or criminal behavior; (2) the defendant had no hesitation about committing a crime when the risk to human life was high; (3) the crime was committed under circumstances under which the potential for bodily injury to the victim was great; and (4) the defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. See Tenn. Code Ann. § 40-35-114. Additionally, the defendant contends that consecutive sentences were not warranted. The conviction is affirmed. Due to the misapplication of enhancement factors, the sentence for aggravated assault is modified to three years and the sentence for evading arrest is reduced to one year. Because the 10 year sentence for rape and the five year sentence for robbery remain the same and because consecutive sentencing is proper, the effective sentence remains at 15 years.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed as Modified.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOE G. RILEY and THOMAS T. WOODALL, JJ., joined.

Richard Hughes, Jr., Assistant Public Defender, Cleveland, Tennessee, for the appellant, Bruce Stevenson.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Stephen D. Crump, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 18, 1999, the victim, Kathy Driver, worked as a supervisor at Bradley County Group Home, where the 16-year-old defendant was a resident. According to the investigation report, the victim had almost completed her work day when she met the defendant in the pantry. The defendant informed her that he wanted to leave the home and demanded that she provide him with the door keys. When she refused, the defendant searched her for the keys. Unsuccessful in his efforts, the defendant jerked the telephone from the wall and wrapped the cord around the victim's neck. He then gagged her mouth, threw her to the floor, removed her clothes and sexually assaulted her. Afterward, the defendant stole \$3 from the victim's purse, found the door keys, and took possession of the victim's driver's license. He then warned the victim: "I'm taking your ID so if you call anybody about this I'll know where you live and I'll come back and kill you." The defendant drove away in the victim's 1997 Ford Mustang and, when found by the police, attempted to evade arrest.

The defendant, who was treated as an adult for this crime, did not testify at the sentencing hearing. He did, however, confess to police that he had raped the victim, stolen her car and money and tried to avoid capture by police. He denied having threatened to kill the victim.

I

The defendant initially argues that the trial court erred in calculating the lengths of his sentences due to the misapplication of statutory enhancement factors. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness fails." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Here, the trial court found numerous enhancement factors generally applicable to all of the offenses. It did not, however, determine whether each of the factors should be applied to each of the convictions. Because the trial court failed to comply with the requirements of Ashby, the sentences are not entitled to the statutory presumption of correctness. Our review is, therefore, de novo as to the lengths of the sentences.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principals of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Except for Class A felonies, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the court may set the sentence above the minimum.

Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id. The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Sentencing Act. See Ashby, 823 S.W.2d at 169.

For a Range I offender, the applicable range for the offenses of robbery and aggravated assault, both Class C felonies, is from three to six years. The range for rape, a Class B felony, is from eight to 12 years. Evading arrest can be classified as a Class E or Class D felony, depending on whether the flight or attempt to elude arrest creates a risk of death or injury to innocent bystanders or other third parties. See Tenn. Code Ann. § 39-16-603(b)(3). In the judgment, the defendant's evading arrest conviction is erroneously listed as a Class D felony. The indictment, record, and plea bargain agreement clearly indicate, however, that the defendant was properly charged and convicted for the Class E felony offense of evading arrest. For a Range I offender, evading arrest ranges from one to two years. At the conclusion of the sentencing hearing, the trial court set five-year sentences for the robbery and aggravated assault convictions and a two-year sentence for evading arrest. The sentences were ordered to be served concurrently. The trial court ordered a consecutive 10-year sentence for the rape conviction, establishing the effective sentence at 15 years.

The trial court found the following enhancement factors applicable without making any differentiations as to the four offenses at issue: (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (10) the defendant had no hesitation about committing a crime when the risk to human life was high; (16) the crime was committed under circumstances under which the potential for bodily injury to a victim was great; and (20) the defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. See Tenn. Code Ann. § 40-35-114. The trial court found the following mitigating factor to be applicable: that the defendant because of his age or youth lacked substantial judgment in committing the offense. See Tenn. Code Ann. § 40-35-113(6). The trial judge, however, placed greater emphasis on the enhancement factors in determining the length of the various sentences imposed and set the Class C felonies at two years above the minimum, the Class E felony at the maximum, and the Class B felony at the midpoint.

First, the defendant argues that the trial court erred by enhancing his sentences under Tenn. Code Ann. § 40-35-114(1). We agree. For offenses committed after July 1, 1995, juvenile adjudications can only be considered under Tenn. Code Ann. § 40-35-114(20), which provides for an enhanced sentence if the juvenile offense would have been a felony if committed by an adult. State v. Glynnon Bradshaw, No. 01C01-9810-CR-00439 (Tenn. Crim. App., at Nashville, Sept. 22, 1999). Of the defendant's prior crimes, only attempted automobile theft could have possibly qualified as a felony if committed as an adult. See Tenn. Code Ann. § 39-12-101; see also Tenn. Code Ann. § 39-14-103. Because the juvenile offense was considered under enhancement factor (20), however, it cannot also be considered under enhancement factor (1). See Tenn. Code Ann. § 40-35-114.

Next, the defendant argues that the trial court erred by applying Tenn. Code Ann. §§ 40-35-114 (10) and (16). He asserts that a high risk to human life and a great potential for bodily injury are inherent in each of the offenses for which he was convicted. See Tenn. Code Ann. § 40-35-114. Enhancement factors may not be used to enhance a sentence if they are “essential elements of the offense.” State v. Poole, 945 S.W.2d 93, 95 (Tenn. 1997). Aggravated assault occurs when a person causes serious bodily injury to another or uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102. This court has previously held that enhancement factors (10) and (16) cannot be applied to the offense of aggravated assault, as they are inherent in the offense. State v. Hill, 885 S.W.2d 357, 363-64 (Tenn. Crim. App. 1994). Therefore, neither Tenn. Code Ann. § 40-35-114(10) nor 114(16) may be used to enhance the defendant’s sentence for aggravated assault.

Rape occurs when there is an unlawful sexual penetration of a victim by a defendant when (1) there is force or coercion; (2) the victim did not consent and the defendant knows or has reason to know the victim did not consent; (3) the defendant knows that the victim is mentally defective, mentally incapacitated, or physically helpless; or (4) the sexual penetration is accomplished by fraud. Tenn. Code Ann. § 39-13-503. That the defendant had no hesitation about committing a crime when the risk to human life was high, or that the crime was committed under circumstances in which the potential for bodily injury to the victim was great, is not necessarily inherent in the offense of rape. Enhancement factors (10) and (16) are properly applied when the proof shows harmful or physically threatening conduct clearly beyond what is necessary to prove the underlying offense. State v. Williams, 920 S.W.2d 247, 260 (Tenn. Crim. App. 1995). In the investigation report, the victim stated that the defendant wrapped a telephone cord around her neck and placed a gag in her mouth. Clearly, the defendant’s actions demonstrate a culpability distinct from and appreciably greater than that which is incident to the crime of rape. Thus, the trial court properly applied Tenn. Code Ann. § 40-35-114 (10) and (16) to the rape conviction.

A robbery occurs when there is an intentional or knowing theft of property from the person of another by violence or by putting the person in fear. Tenn. Code Ann. § 39-13-401. The stipulated facts establish that after the rape, the defendant led the victim to the office, where he took the victim’s car keys, her identification and two to three dollars. He told the victim that he would return to kill her if she called the police. The defendant then ordered the victim to unlock the door, so that he could leave. Our supreme court has held that enhancement factors (10) and (16) are not, as a matter of law, essential elements of the offense of robbery and may be properly utilized when imposing a sentence for robbery so long as the facts which establish the elements of the offense are not also relied upon to establish the enhancement factors. State v. Lavender, 967 S.W.2d 803, 809 (Tenn. 1998). Here, the defendant forcibly detained the victim and threatened to kill her if she revealed his crimes. The telephone cord around the victim’s neck and the gag in her mouth were exacerbating circumstances. Each presented risks to human life and a potential for bodily injury. In our view, enhancement factors (10) and (16) were properly applied to the robbery.

Next, the defendant contends that the trial court erred by applying enhancement factors (10) and (16) to his conviction for evading arrest. That offense occurs when a person, who has been arrested or knows that an officer is attempting to arrest him, intentionally flees from law enforcement. Tenn. Code Ann. § 39-16-603. In his statement to police, the defendant admitted that

he was attempting to elude police officers, but did not recall how fast he was traveling in the victim's car. The defendant had to stop when he turned onto a dead-end road. There is no other evidence in the record that would establish either the applicability of either one of these enhancement factors. Because there is no supporting proof that the defendant's actions in evading arrest actually posed a high risk to the lives of other motorists or pedestrians or that there was a great potential for bodily injury, the enhancement factors were improperly applied to this conviction.

Finally, the defendant argues that the trial court erred by applying Tenn. Code Ann. § 40-35-114 (20). He claims that there is no juvenile adjudication set forth in the record that would be considered a felony conviction if committed by an adult. We must agree.

The defendant had a prior juvenile offense for attempted automobile theft on October 4, 1996, for which he received a one-year period of probation. The state contends that although the record does not indicate the grade of theft involved, the fact that the defendant received a sentence longer than 11 months and 29 days is conclusive proof that the conviction was a felony. It argues that 11 months and 29 days is the maximum sentence any defendant may receive for a misdemeanor and any period of probation greater than that amount must be a felony.

When a child is found to be delinquent, a juvenile court may place the child on probation under conditions and limitations set by the judge. See Tenn. Code Ann. § 37-1-137(a)(1)(A). Thus, the juvenile court had the authority to order an indefinite period of probation regardless of whether the offense was a misdemeanor. Furthermore, even if the state had proven that the automobile the defendant attempted to steal was valued at greater than \$500, but less than \$1,000, it would not constitute a felony. Because criminal attempt is one grade lower than the offense attempted, the offense would have been equivalent to a Class A misdemeanor. See Tenn. Code Ann. 39-12-107. For the enhancement factor to apply, the state had to submit proof that the automobile the defendant attempted to steal was valued at \$1,000 or more.

In sum, the trial court properly applied enhancement factors (10) and (16) to the defendant's sentence for robbery, but improperly applied factors (1) and (20). Because the minimum sentence for the robbery conviction is three years, and two enhancement factors are applicable, a five-year sentence is appropriate. None of the enhancement factors were properly applied to the defendant's sentences for aggravated assault and evading arrest. As a result, those sentences are modified to the minimum, three years and one year, respectively. Because these sentences were ordered to be served concurrently, the defendant's effective concurrent sentence remains at five years. Finally, enhancement factors (1) and (20) were misapplied to the defendant's rape conviction. Two other factors do apply. Thus, a mid-range sentence of 10 years is appropriate.

II

Next, the defendant argues that the trial court erred by imposing consecutive sentences. We disagree. Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, the court

established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d 227, 230 (Tenn. 1987).

The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115 Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exist:

- (1) The defendant is a professional criminal who has knowingly devoted [himself] . . . to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation;
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115 (b).

The length of the sentence, when consecutive in nature, must be “justly deserved in relation to the seriousness of the offense,” Tenn. Code Ann. § 40-35-102(1), and “no greater than that

deserved” under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

In imposing consecutive sentences, the trial judge made the following statement:

The State has proposed that . . . paragraph (4) is applicable under the consecutive sentencing provisions of 40-35-115, subsection (b); “That the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” The presentence psychosexual report prepared by the people set forth there so indicates that this is a problem you have because of the evaluation that they have done. And sir, I would further show that the . . . this alleged statement was made by you at the time of the act, that after you completed the rape, you took three dollars and her driver’s license, and told the victim that you were taking her I.D. so that you – if she called anybody about this, you would know where she lived and that you would come back and kill her. I find that all of those matters collectively show that the State has met the requirements set forth in paragraph four of that subsection on consecutive sentences.

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender “unless the terms reasonably relate[] to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct.” The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a “human process that neither can nor should be reduced to a set of fixed and mechanical rules.” Wilkerson, 905 S.W.2d at 938. The elements adopted in Wilkerson as required for a finding of dangerous offender are as follows: that the sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. Id.

_____The trial court concluded that the defendant was a dangerous offender, but did not address any of the Wilkerson factors. Nevertheless, the record supports the imposition of consecutive sentences. First, the term reasonably relates to the severity of the offenses. Proof adduced at the sentence hearing shows that the defendant threw the victim to the floor, wrapped a telephone cord around her neck, gagged her, ripped off her clothes, raped her, and threatened her life. Afterward,

the defendant robbed the victim and stole her car. Second, the defendant has an extensive criminal history and consecutive sentences are necessary to protect the public against further criminal conduct. Among the defendant's prior convictions are four counts of theft, four counts of violating probation and community placement, possession of drug paraphernalia, attempted auto theft, aggravated criminal trespassing, and assault. Finally, the imposition of consecutive sentences is congruent with general principles of sentencing, because of the severity of the offenses and the aggravating circumstances involved.

In conclusion, the defendant's sentence for robbery remains at five years. His sentences for aggravated assault and evading arrest are modified to three years and one year, respectively. Because these sentences were ordered to be served concurrently, the defendant's effective concurrent sentence remains at five years. Finally, the defendant's rape conviction remains at 10 years. The defendant's effective sentence, as modified, remains 15 years in the Department of Correction.

GARY R. WADE, PRESIDING JUDGE